IN THE HIGH COURT OF DELHI AT NEW DELHI

+ FAO(OS) No.463/2007

% Date of Decision: 20th November, 2007

Smt. Shakuntala Rani ..... Appellant
! Through: Mr.J.P. Sengh, Advocate with
Mr.Ashish Aggarwal, Advocate

versus

$ Sh.D.P. Joshi ..... Respondent
^ Through:

CORAM:
* **HON'BLE MR.JUSTICE T.S.THAKUR**
* **HON'BLE MS. JUSTICE VEENA BIRBAL**

1. Whether Reporters of local papers may be allowed to see the judgment? No
2. To be referred to the Reporter or not? No
3. Whether the judgment should be reported in the Digest? No

T.S.THAKUR, J. (ORAL)

CM No.15904/2007

Heard. Allowed, subject to just exceptions.

FAO(OS) No.463/2007 & CM No.15903/2007

This appeal arises out of an order dated 28.9.2007 passed by a learned single Judge of this Court whereby an earlier order passed by him on 11.9.2007 disposing of a petition under Section 9 of the Arbitration and Conciliation Act, 1996 as infructuous has been recalled.

2. A petition under Section 9 of the Arbitration and Conciliation Act, 1996 was filed by the respondent in this appeal seeking certain interim directions pending adjudication of the disputes between the parties in terms of the arbitration agreement entered into between them. While the petition was pending, an agreement described by the appellant herein as a settlement is alleged to have been executed between the appellant and the respondent on 15th of June, 2006. When the petition under Section 9 came up before the court for orders on 26.8.2006, it was argued by counsel for the appellant herein that the same had become infructuous as the parties had entered into an amicable settlement. Instead of the matter being disposed of on that statement and submission, the same was adjourned to 9th November, 2006 and later to 23rd November, 2006 when counsel for the petitioner, respondent in this appeal, refuted the assertion that any settlement as alleged had taken place between the parties. This is evident from a reading of the order passed by learned single Judge on 23.11.2006 which may be extracted at this stage:

> "It is stated that no settlement has taken place between the parties. Learned counsel for the respondent seeks time to file reply to the petition. Let reply be filed within two weeks, rejoinder within two weeks thereafter.

> List on 15th March, 2007. Interim order to continue."

3. The matter then came up before the Court on 11th September, 2007 when the learned single Judge passed an order disposing of the petition as infructuous in the light of the alleged settlement. The order reads as under:

> "It is submitted that the matter between the parties has been compromised. In view of the compromise between the parties, this petition has become infructuous. The learned counsel for the petitioner seeks permission to withdraw the present petition. The present petition is accordingly dismissed as having become infructuous. No order as to costs."

4. An application was shortly thereafter filed by the respondent in this appeal for recall of the above order in which it was, inter alia, alleged that Shri Ajay Bansal counsel for the respondent was out of Delhi on 11.9.2007 and that he had left instructions with his colleague Mr.Ashish Garg, who was fresh at the Bar, to seek an adjournment. It was further alleged that when the matter came up before the court and the appellant reasserted that a settlement had taken place, Shri Ashish Garg the junior counsel kept quite as he did not have complete instructions and being fresh at the Bar was unable to persuade the court to adjourn the matter to take proper instructions. It was asserted that no settlement like the one alleged by the

appellant had actually been arrived at between the parties so as to render the petition under Section 9 of the Act infructuous, or justify its dismissal as directed by the Court. The learned single Judge upon consideration of the rival contentions has by the order impugned in this appeal recalled his order dated 11.9.2007 and restored OMP No.76/2006. The present appeal, as already noticed earlier, assails the correctness of that order.

5. Appearing for the appellant Mr.J.P. Sengh strenuously argued that the learned single Judge was in error in having disbelieved the version given by the appellant that a settlement had indeed taken place. He submitted that the circumstances of the case clearly showed that a settlement had actually been arrived at between the parties in the light whereof the dismissal of the petition as infructuous was perfectly justified. We regret our inability to accept that submission. As noticed earlier and as rightly observed by the learned single Judge, the question whether there was an amicable settlement between the parties is a disputed question. While the appellant asserts that agreement dated 15.6.2006 was in the nature of a final settlement between the parties, the respondent herein disputes that position. Even on 23.11.2006 when the appellant had asserted a settlement having taken place, the respondent in this

appeal had disputed the same. That Shri Ajay Bansal counsel for the respondent was not available in Delhi on the date, the matter was eventually disposed of by the court is admitted. It is also admitted that Shri Bansal was represented by a proxy counsel Shri Ashish Garg. It is, therefore, obvious that the assertion which had earlier been made and which had not prevailed with the Court had carried the day in favour of the appellant without a proper contest on the part of the respondent in tune with the stand which was already made clear on the previous date of hearing. The learned singe Judge was in that backdrop perfectly justified in holding that the disposal of the petition as infructuous on a factual premise which was disputed between the parties was not justified.

6. Mr. J.P. Sengh next argued that the learned single Judge had declared the settlement to be non est and thereby left no option for the appellant to assert that such a settlement had indeed taken place. We do not think so. The learned single Judge has recalled the order passed by him on the ground that the dismissal of the petition on a premise which was disputed was not justified. He has simply held the alleged settlement to be a disputed question without going into the question of the genuineness of such a settlement. Whether or not a settlement

has indeed taken place, therefore, remains at large and can be examined by the court if the appellant were to rely upon the same as a defence to the maintainability of the petition filed by the respondent. There is in that view no prejudice caused to the appellant on the question of the existence of the settlement as such. Needless to say that it shall be open to the appellant to assert that such a settlement had taken place as one of the defences to the maintainability of the petition in which event the court is expected to go into that aspect also. With these observations, this appeal fails and is dismissed in limine.

T.S.THAKUR, J

VEENA BIRBAL, J

November 20, 2007
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